TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 366

THE UNITED STATES, PETITIONER

vs.

BROOKS-CALLAWAY COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1942
CERTIORARI GRANTED OCTOBER 19, 1942

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES, PETITIONER

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BROOKS-CALLAWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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496609—42

1 IN THE COURT OF CLAIMS

No. 44809

BROOKS-CALLAWAY COMPANY

v.

THE UNITED STATES

I. *Petition*

(Filed August 26, 1939)

To the Honorable the Court of Claims:

The plaintiff, Brooks-Callaway Company, respectfully represents:

I. It is a corporation organized and existing under the laws of the State of Georgia, with its principal place of business in the City of Atlanta, in the State of Georgia. At the times hereinafter mentioned, it was engaged in general construction work.

II. On October 12, 1931, plaintiff entered into a contract with defendant through the War Department, wherein plaintiff agreed to—

"furnish all labor and materials, and perform all work required for the construction of Item R. 848, Missouri Bend Levee, Lots A, B, & C, containing approximately two million three hundred thousand (2,300,000) cubic yards, situated in the Atchafalaya Front Levee District, and Item L. 868, St. Gabriel Levee, Lots A, B, & C, containing approximately one million seven hundred fifty thousand (1,750,000) cubic yards, situated in the Pont-
2 chartrain Levee District, for the consideration of Twelve (12) cents per cubic yard, place measurement, in strict accordance with the specifications, schedules, and drawings, * * *."

Paragraph 3 of the specifications provided that for each item of work, liquidated damages for delay would be at the rate of $20.00 per day for each calendar day of delay.

Paragraph 39 of the specifications provided that each item of work should be completed within 450 calendar days after the date of receipt of notice to proceed.

A true and correct copy of the pertinent portions of said contract and specifications is attached hereto, made a part hereof, and marked Exhibit "A."

III. Notice to proceed was received October 22, 1931, thereby fixing January 14, 1933, as the date for completion of each section of the levees.

IV. Sections A and B of the Missouri Bend Levee were completed within the contract time, but Section C of said levee was not completed until March 22, 1933, 67 days after the contract completion date. Liquidated damages were deducted from payments otherwise due plaintiff for 67 days at the rate of $20.00 per day, or in the sum of $1,340.00. Plaintiff was delayed 112 days on account of high water during the construction of Section A of said levee, which delay in turn postponed commencement of work in Section C for a similar period. But for the delay caused by high water, Section C of the Missouri Bend Levee would have been completed prior to the contract completion date.

V. Sections A and B of the St. Gabriel Levee were
3 completed within the contract time, but due to causes
set out hereinafter in paragraphs VI, VII and VIII of this petition, Section C of said levee was not completed until August 25, 1933, 223 days after the contract completion date. Liquidated damages were deducted from payments otherwise due plaintiff for 223 days at the rate of $20.00 per day, or in the sum of $4,460.00.

VI. Prior to the contract completion date, plaintiff was delayed 166 days in the completion of Section C of the St. Gabriel Levee by reason of high water.

VII. Due to an injunction suit restraining the Levee Board from furnishing the right-of-way for Section C of the St. Gabriel Levee, plaintiff was unable to commence work in said section until late in the year 1932. As a result of said delay, plaintiff was forced to abandon its plan of operations which contemplated that the low sections of the levee should be constructed first since they would be the first to be affected by high water. But for the delay in securing the right-of-way for said Section C, and the resultant disruption of plaintiff's plan of operations, the St. Gabriel Levee would have been completed prior to the contract completion date.

VIII. The St. Gabriel Levee was located on the river side of the old levee from which plaintiff was permitted to take materials for construction of the new levee. In early January, 1933, work on Section C of the St. Gabriel Levee was completed except for a distance of approximately 1,000 feet. At this time the area engineer, in anticipation of high water, directed plaintiff to construct a temporary tie-in levee to a point in the old levee approximately
400 feet distant from the completed portion of the new
4 levee. Plaintiff requested permission to build a tie-in levee
along the bed of the new levee in order that the remaining

1,000 feet of said new levee could be completed without delay. This request was denied, whereupon plaintiff constructed the tie-in levee as directed. There was no high water until April 1933, and not until August of the same year did weather conditions permit plaintiff to resume work on completion of the St. Gabriel Levee. Had plaintiff been permitted to construct the tie-in levee along the bed of the new levee, as requested, Section C of the St. Gabriel Levee would have been completed within the contract time.

IX. On August 31, 1933, plaintiff submitted to the contracting officer a claim for remission of liquidated damages. In said claim plaintiff contended that the delay in completion of the contract was due to no fault of its own, but was caused by high water, the delay in securing the right-of-way for Section C of the St. Gabriel Levee, and the delay incident to being compelled to construct the tie-in levee in said Section C. By letter dated February 17, 1934, the contracting officer notified plaintiff that its claim had been forwarded to the General Accounting Office with recommendations. No copy of any recommendation which the contracting officer may have made with reference to said claim has ever been forwarded to plaintiff.

X. On April 10, 1934, the Comptroller General ruled that plaintiff was entitled to remission of liquidated damages in the sum of $1,900.00. The Comptroller General stated that the contracting officer had found that with respect to Section C of the Missouri Bend Levee there was a delay of 112 days due to high water during the contract period, that the normal expected
5 delay on account of high water during said period was 83 days, and that thus there was an excusable delay of 29 days in the completion of said Section C. The Comptroller General also stated that with respect to the delay in the completion of Section C of the St. Gabriel Levee, the contracting officer had found that there was a delay of 166 days on account of high water, of which 100 days were considered forseeable. Upon these recommendations, the Comptroller General ruled that plaintiff was entitled to remission of liquidated damages for 29 days of unforeseeable high water in the case of Section C of the Missouri Bend Levee, and for 66 days of unforeseeable high water with respect to Section C of the St. Gabriel Levee. The Comptroller General refused to remit liquidated damages for the delay arising from the injunction suit with respect to Section C of the St. Gabriel Levee, basing his decision on the statement that the contracting officer had found that the injunction was dissolved prior to the actual commencement of work on said section. The Comptroller General also ruled that since the contracting officer had found that the causes of the other delays were not excusable under the terms of

the contract, no remission of liquidated damages in excess of $1,000.00 could be allowed.

XI. Plaintiff, having completed performance of its contract in accordance with the terms thereof, and having been delayed in said performance through no fault of its own, but due to causes heretofore mentioned, therefore claims the balance of the contract price improperly withheld as for liquidated damages in the sum of $3,900.00.

6 XII. No other action has been had on said claim in Congress or by any of the departments; no person other than the plaintiff is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the plaintiff is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The plaintiff is a citizen of the United States. And the plaintiff claims $3,900.00.

King & King,
Attorneys for Plaintiff.

[*Duly sworn to by John W. Gaskins; jurat omitted in printing.*]

7 II. *Exhibit A to petition*

(Filed August 26, 1939)

Contract for Construction

This Contract, entered into this Twelfth day of October 1931 by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and Brooks-Callaway Company, a corporation organized and existing under the laws of the State of Georgia, of the city of Atlanta, in the State of Georgia, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

Article 1. Statement of work.—The contractor shall furnish all labor and materials, and perform all work required for the construction of Item R. 848, Missouri Bend Levee, Lots A, B, and C, containing approximately two million three hundred thousand (2,300,000) cubic yards, situated in the Atchafalaya Front Levee District, and Item L 868, St. Gabriel Levee, Lots A, B, and C, containing approximately one million seven hundred fifty thousand (1,750,000) cubic yards, situated in the Pontchartrain Levee District, for the consideration of Twelve (12) cents per cubic yard,

place measurement, in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Engineer Department, U. S.
8 Army, Standard Specifications for Levee Work, No. 3238, dated August 25, 1931, and drawings entitled "Item R 848, Missouri Bend Levee, File No. L-8-2280," and "Item L 868, St. Gabriel Levee, File No. L-8-2269.".

The work shall be commenced as provided for in paragraph 2 of the specifications attached hereto and made a part hereof, and shall be completed within the time fixed for completion in paragraph 39 of said specifications.

ARTICLE 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ARTICLE 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in
9 writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

* * * * *

ARTICLE 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor
10 charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the begining of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

* * * * *

ARTICLE 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the

department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

* * * * *

ARTICLE 18. Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

* * * * *

11 In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA,
By J. N. HODGES,
Lieut. Col., Corps of Engineers, U. S. Army.
BROOKS-CALLAWAY COMPANY,
By J. L. BROOKS,
Vice-President,
1522 Healy Bldg., Atlanta, Ga.,
Contractor.

Two witnesses:
CARLTON Y. SMITH,
S. H. RUMPH.

* * * * *

ENGINEER DEPARTMENT, U. S. ARMY

STANDARD SPECIFICATIONS FOR LEVEE WORK

* * * * *

2. Commencement, prosecution, and completion.—The contractor will be required to commence work under the contract within 20 calendar days after the date of receipt of notice to proceed and to complete it within the time fixed for completion in paragraph 39 of these specifications.

3. Liquidated damages.—For each item of work as listed in paragraph 39 hereof, liquidated damages for delay will be at the rate of $20.00 per day for each and every calendar day of delay beyond the time fixed for its completion.

* * * * *

8. Award of contract.—The right is reserved to award all the work covered by these specifications to one bidder, or to award items of work as listed in paragraph No. 39 separately or in com-

binations to two or more bidders, or to reject any or all bids, as may be for the best interest of the United States. A bid or bids may be rejected on the ground that the bidder is lacking in the necessary capital, equipment, resources, and/or expe-
12 rience, that he is obligated for the performance of as much work as he will probably be able to perform during the period contemplated by these specifications, or that he was unjustifiably dilatory, inattentive, and/or negligent in the performance of, or has unjustifiably defaulted on past work for the Government, or for other causes.

* * * * *

13. Right of way and material.—This agreement is made with the understanding that the right of way and earth for constructing the levee will be furnished without cost to the contractor, except as provided in paragraph 22 (*b*). Days upon which work is prevented by failure to provide necessary right of way will not be counted against the contractor as delay in completion of contract, nor in computing the time stipulated in paragraph 2 hereof for commencement of work; but no claim is to be made by the contractor for damage or expense occasioned by delay or failure in securing right of way. In event of failure to obtain right of way for all or any portion of the line by the time construction has progressed thereto, the contracting officer shall have the right to omit work on such line or portion of the line.

* * * * *

35. Old levees, spurs, etc.—All existing levees, parts of levees, or spurs must be left intact, unless otherwise stated in paragraph 39 and shown on the plans that they may be cut. In all cases where material in the controlling levee is used or the controlling levee line weakened or destroyed in the construction of a new levee, the work shall be so planned and executed that the new levee or a spoil bank of a net grade and section prescribed by the contracting officer but not exceeding the existing grade and section of the controlling levee, will be completed as the controlling levee is weakened or removed, in order that the work may, with the equipment or facilities available on the job, be promptly tied-in or connected with the controlling levee so as to furnish a continuous levee line for protection in an emergency. Construction plans covering the above requirements shall be submitted to the con-
13 tracting officer. No method failing to provide this protection will be accepted and no material shall be removed from the controlling levee until such plans have been approved in writing by the contracting officer. These plans shall provide for a minimum number of tie-ins in an emergency. In the event that the construction of tie-in levees is required before the expiration

of the contract period prescribed in paragraph 39 hereof, payment therefor will be made by the United States as prescribed in paragraph 37. Where the method of construction jeopardizes the safety of the controlling levee, the contracting officer reserves the right to suspend the contractor's operations for any period or periods of time during the flood season that in the opinion of the contracting officer is warranted, so as to eliminate danger of overflow by unseasonable construction and no claim shall be made by the construction of tie-in levees is required before the expiration sion of operations or occasioned by construction difficulties on account of the building of the tie-in levees.

* * * * *

37. *Damage or injury to work.*—In anticipation of destructive floods during the progress of the work, the contracting officer may require a protection of timber or other material to be constructed around the ends of the levee or elsewhere, and also a temporary protective levee to be built in front of the work, upon such location and of such dimensions as he may direct. If such a protective levee is built the contractor will be paid the contract price per cubic yard; for other protective work he will be paid the actual cost plus 10 percent. All damage or injury to work, resulting from floods or other causes before the work has been accepted by the contracting officer, shall be sustained by the contractor.

* * * * *

39. description of work.—

* * * * *

Item	Stations	Kind of work	Cubic yards	Net height (feet)
R 848-A, Missouri Bend Levee	4188+80 to 4280+00	New	675,000	22-24
		and Enlgt	85,000	23-24
Total			760,000	

14 (a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 450 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from the existing levee to the extent indicated on drawings.

(c) Cross-Section: The soil conditions indicate that a "B" section is required throughout. The enlargement shall be constructed on shifted centerline with a 10-foot crown, 1 on 3.5 river-

side slope and landside slope extended through the existing levee to meet the old banquette at its riverside edge as indicated in typical section on drawing. The crown of the existing levee shall be cut to conform to the landside slope of the enlargement.

(d) Placement: Riverside enlargement between stations 4188+80 and 4213+80, estimated contents 85,000 cubic yards. New levee between stations 4213+80 and 4280+00, estimated contents 675,000 cubic yards.

Item, R 848–B, Missouri Bend Levee; stations, 4280+00 to 4335+00; kind of work, New; cubic yards, 770,000; net height feet, 24–28.

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 450 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from the existing levee to the extent indicated on drawings.

15 (c) Cross-Section: The soil conditions indicate that a "B" section is required throughout.

Item R 848–C, Missouri Bend Levee; Stations 4335+00 to 4385+51=4384+00 c. s.; kind of work New; cubic yards, 770,000; net height feet 23–28.

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 450 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from the existing levee to the extent indicated on the map. Where the new levee ties into the Australia Point Levee, now under construction, riverside pit restrictions with reference to the land-side toe of the Australia Point Levee shall govern the depth of excavation, as indicated on the drawing.

(c) Cross-Section: The soil conditions indicate that a "B" section is required throughout.

* * * * * *

Item L 868–A, St. Gabriel Levee; Stations 1273+16 to 1352+00; kind of work, new; cubic yards, 585,000; net height feet, 18–21.

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications, and shall be completed within 450 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from the existing levee to the extent indicated on drawings.

16 (c) Cross-Section: The soil conditions indicate that a "B" section is required throughout.

Item L 868-B, St Gabriel Levee; Stations 1352+00 to 1428+00; kind of work, New; cubic yards, 585,000; net height feet, 18–21.

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications, and shall be completed within 450 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from the existing levee to the extent indicated on drawings.

(c) Cross-Section: The soil conditions indicate that a "B" section is required throughout.

Item L 868–C, St. Gabriel Levee; Stations 1428+00 to 1496+93=1498+72 c. s.; kind of work, New; cubic yards, 580,000; net height feet, 19–23.

(a) Time: Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 450 calendar days from date of receipt of notice to proceed.

(b) Borrow Pits: The material for this work shall be obtained from riverside borrow pits and from the existing levee to the extent indicated on drawings.

(c) Cross-Section: The soil conditions indicate that a "B" section is required throughout.

* * * * * *

17 III. *General traverse*

Filed October 5, 1939

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

FRANCIS M. SHEA,
ETF *Assistant Attorney General.*

IV. *Argument and submission of case*

On February 4, 1942, the case was argued and submitted on merits by Mr. George R. Shields for plaintiff, and by Mr. Newell A. Clapp for defendant.

19 V. *Special findings of fact, conclusion of law and opinion of the court by Whitaker, J., and dissent in part by Madden, J.*

Filed June 1, 1942

Mr. George R. Shields for the plaintiff. King & King were on the briefs.

Mr. Newell A. Clapp, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant. Mr. Gaines V. Palmes was on the briefs.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special findings of fact

1. The plaintiff is a corporation organized under the laws of the State of Georgia.

2. On October 12, 1931, plaintiff and defendant entered into a contract whereby, for the consideration of 12 cents per cubic yard, place measurement, plaintiff agreed to furnish all labor and materials, and perform all work required for the construction of Item R 848, Missouri Bend Levee, Lots A, B, and C, containing approximately 2,300,000 cubic yards, situated in the Atchafalaya Front Levee District, and Item L 868, St. Gabriel Levee, Lots A, B, and C, containing approximately 1,750,000 cubic yards, situated in the Pontchartrain Levee District, both on the Mississippi River, in accordance with specifications, schedules, and drawings made a part of the contract. The contractor was required by the contract to commence work within 20 calendar days
20 after the date of receipt of notice to proceed, and complete it within 450 calendar days thereafter. The material for the work was to be obtained from riverside borrow pits and from the existing levee to the extent indicated on the drawings.

The right-of-way and earth for constructing the levee was to be furnished without cost to the contractor. Except for about 85,000 cubic yards of riverside enlargement of an existing levee of Item A of the Missouri Bend, the work consisted of new levee, roughly paralleling an existing levee.

3. Paragraph 35 of the specifications provided:

"35. Old levees, spurs, etc.—All existing levees, parts of levees, or spurs must be left intact, unless otherwise stated in paragraph 32 and shown on the plans that they may be cut. In all cases where material in the controlling levee is used or the controlling levee line weakened or destroyed in the construction of a new levee, the work shall be so planned and executed that the new levee or a spoil bank of a net grade and section prescribed by the contracting officer, but not exceeding the existing grade and section of the controlling levee, will be completed as the controlling levee is weakened or removed, in order that the work may, with the equipment or facilities available on the job, be promptly tied-in or connected with the controlling levee so as to furnish a continuous levee line for protection in an emergency. Construction

plans covering the above requirements shall be submitted to the contracting officer. No method failing to provide this protection will be accepted and no material shall be removed from the controlling levee until such plans have been approved in writing by the contracting officer. These plans shall provide for a minimum number of tie-ins in an emergency. In the event that the construction of tie-in levees is required before the expiration of the contract period prescribed in paragraph 39 hereof, payment therefor will be made by the United States as prescribed in paragraph 37. Where the method of construction jeopardizes the safety of the controlling levee, the contracting officer reserves the right to suspend the contractor's operations for any period or periods of time during the flood season that in the opinion of the contracting officer is warranted, so as to eliminate danger of overflow by unseasonable construction and no claim shall be made by the contractor for damage or expense occasioned by such suspension of operations or occasioned by construction difficulties on account of the building of the tie-in levees.

21 4. Paragraph 37 of the specifications provided that:

In anticipation of destructive floods during the progress of the work, the contracting officer may require a * * * temporary protective levee to be built in front of the work, upon such location and of such dimensions as he may direct. If such a protective levee is built the contractor will be paid the contract price per cubic yard * * *.

5. Article 9 of the contract provided:

ARTICLE 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated

damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unfor'seeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such
22 causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

The contracting officer for the United States was J. N. Hodges, Lieut. Col., Corps of Engineers, United States Army.

6. Notice to proceed was given to the contractor October 22, 1931. Both jobs were due to be completed on January 14, 1933. The Missouri Bend Levee was completed on March 22, 1933, and the St. Gabriel Levee on August 25, 1933.

7. Liquidated damages of $5,800 at $20.00 a day for a total delay of 290 days were deducted, at which plaintiff protested. Upon consideration of this protest the contracting officer found that plaintiff had been delayed by high water during the contract period 112 days on the Missouri Bend Levee, and 4 days on the St. Gabriel Levee, and that it had been further delayed by high water after the contract period for 162 days on the St. Gabriel Levee. He held that of the total delay due to high water 183 days was the delay normally to be expected on account of high water, and that 95 days could not have been anticipated. He, therefore, recommended that liquidated damages in the sum of $1,900 be remitted, but that the balance be retained. Settlement was made on this basis.

8. Of the $3,900 finally deducted for liquidated damages, $3,660 thereof was deducted for delays due to high water, which the contracting officer held could have been expected, and the balance of 12 days was delay alleged to be due to the requirement that plaintiff should start construction of the St. Gabriel Levee at the

upstream end of the construction, instead of the downstream end. This is alleged to have necessitated the building of a tie-in levee, the building of which is alleged to have caused the
23 delay. With reference to the claim for this delay the contracting officer made the following findings:

(a) Right-of-way complications at no time during the construction of the St. Gabriel Levee interfered with the contractor's progress. Prior to commencement of operations on this job, there was some litigation over a piece of property which comprised a portion of the right-of-way on Item C. The landowner in this case threatened suit against the Pontchartrain Levee Board and obtained a preliminary injunction enjoining the Levee Board from furnishing the Government the necessary right-of-way. Upon compromise, however, the suit was dismissed and the preliminary injunction issued in connection therewith, dissolved; all prior to actual commencement of work on St. Gabriel Levee. There were existent on Item B of St. Gabriel Levee, two irrigation ditches which traversed the right-of-way, but these were filled before construction of Item B commenced, consequently no delay due to irrigation facilities could ever have impeded work on this item. The only instance which might be considered as a possible exception to the pronouncement at the first of this paragraph, and for which an equitable adjustment was arranged, was that pertaining to the cemetery on Item C. This cemetery was only partially removed. It restricted the borrow pit area in that vicinity, necessitating lengthened haulage on the material placed in the stations opposite. This material was obtained from the controlling levee. Change Order No. 1, dated November 15, 1932, approved by the Chief of Engineers December 6, 1932, filed 3504 (New Orls, 2nd D. O.) 1067/2, increased the price to be paid on the material involved in these stations, thereby giving the contractor all consideration that could reasonably be expected in such a case. There was included in the Change Order a stipulation which specified that no additional time would be allowed because of the price modification. Additional equipment could have been installed on this job at any time during the favorable working season, moreover, in most cases it is not essential that the installation of additional equipment be conditional upon the provision of certain rights-of-way. The contractor was informed in October, 1932, [sic] shortly after award of the contract and some months prior to actual commencement of construction, that, due to right-of-way difficulties being encountered at that time,
24 which would probably be of only short duration, he should execute the work in a certain prescribed manner—such dictation being entirely within the province of the contracting offi-

cer's authority as established in paragraph 17 of the Standard Specifications. As mentioned previously, the difficulties in question were cleared up before operations on this job were initiated.

(b) The contractor contends that he was forced to build a tie-in on St. Gabriel Levee when the job was practically complete. Paragraph 35 of the Standard Specifications invests in the contracting officer authority to order a tie-in and suspension of operations for any period of time which in his opinion is warranted. The order for the tie-in referred to was issued on January 6, 1933, reiterated on January 10, 1933, and construction on this was not begun until issuance of the second order. The contractor further contends that the tie-in was not necessary, and that the levee could have been completed before the existence of over-bank stages upon this locality. Any discretionary powers of the contractor in such instances are nonexistent as far as decisions relative to tie-in are concerned, the contracting officer having absolute authority in the matter. At the time the tie-in was ordered, the job was only 86% complete and the stage of the water on the Plaquemine gage, that in closest proximity to this work, was 15.1 feet. At the rate of progress being maintained at that time, completion could not have been effected until about March 25, 1933—exclusive of delays, which were most imminent at that time—on which date the river stage was 23.0 feet. In the interim, however, the river rose to 26.6 feet on the Plaquemine gage, a rather high stage for this period. This office is not cognizant of the matter alluded to by the contractor in his statement, "* * * and by your method of figuring there would not have been any delay on the St. Gabriel job." Neither is it cognizant of the debit of $3,800.00 forced upon the contractor and alluded to by him in the second paragraph of the supplementary claim.

A copy of these findings was not furnished the plaintiff by the contracting officer, and in consequence no appeal was taken therefrom to the head of the department.

9. Paragraph 17 of the specifications attached to and forming a part of the contract provides:

> 17. Order of work.—The contracting officer shall have power to designate the exact localities at which the work shall be
> 25 prosecuted; also the proportion of the force that shall be worked at any designated locality; and the time when sodding and other incidental work shall be done.

10. Plaintiff was notified by the contracting officer on October 27, 1931 to begin construction of St. Gabriel Levee at the upstream end thereof, due to the following:

Due to the inability of the Pontchartrain Levee Board to furnish a continuous right-of-way throughout the proposed area of opera-

tions under the contract, the work must be planned so as to minimize the possibility of delay occurring thereby. It is believed that the difficulty encountered will be of temporary duration and that the right-of-way will eventually be furnished.

Upon receipt of this letter plaintiff on October 30, 1931 replied as follows:

We have your letter of Oct. 27th; we will begin operations as directed at the upstream end of the St. Gabriel Levee, Item 868–A, at Station 1273+16 and work south.

The right-of-way for the construction of lot C of the St. Gabriel Levee was obtained prior to the time that plaintiff was ready to begin work thereon.

11. Beginning on January 6, 1933 the Mississippi River in the proximity of the St. Gabriel Levee began to rise. On that date the river stage was at elevation 17.3; on January 7 it was at elevation 18.4; on January 8 it was at elevation 19.4; on January 9, at 20.4; and on January 10, at 21.4. Flood stages were predicted. On January 6 the contracting officer wired plaintiff as follows:

Re Saint Gabriel Levee you are directed to construct tie-in to controlling line beginning as near lower side of cemetery as possible. Stop. Construction of new levee from present location of machine to point of tie-in must be expedited. Stop. Cross section to be not less than that of the existing levee. Stop. Detailed instructions will be issued by area engineer.

Upon receipt of this telegram, plaintiff orally protested the order to build a tie-in levee, and requested authority to continue working along the new levee line, and thus connect the new
26 levee with the controlling levee in lieu of building a tie-in at an angle as directed. This request was denied, and on January 10, 1933, the following telegram was sent by the contracting officer to the plaintiff:

Reference your conversation Chief Third Area St. Gabriel Levee, you are again directed to tie this levee in to controlling line as indicated in telegram dated January sixth.

No further protest against the order to construct the tie-in was made by plaintiff, and no appeal from the decision of the contracting officer was taken to the head of the department.

12. On January 10, 1933 there remained to be completed 1,484 feet of new levee, involving about 80,000 cubic yards of material. The tie-in required the construction of about 670 feet of levee, involving 27,951 cubic yards.

13. The order of the contracting officer directing the building of the tie-in levee was reasonable under the circumstances.

14. The sum of $3,900, so withheld as liquidated damages, has not been paid to the plaintiff in whole or in part.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover $3,660.00.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of three thousand six hundred sixty dollars ($3,660.00).

Opinion

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues the defendant for the amount deducted as liquidated damages for delay.

The plaintiff had a contract to build lots A, B, and C of the Missouri Bend Levee, and lots A, B, and C of the St. Gabriel Levee. Both jobs had to be completed within 450 calendar days from the date of notice to proceed. The Missouri Bend Levee was
27 completed 67 days after the date set for completion, and the St. Gabriel Levee was completed 223 days later.

The defendant originally deduced $5,800 for liquidated damages for a total of 290 days beyond the termination date. The plaintiff filed claim for the amount deducted. The contracting officer, in acting upon this claim, found that the plaintiff had been delayed during the contract period by high water on the Missouri Bend Levee 112 days, and on the St. Gabriel Levee 4 days, and that the normal expected delay during this period was 83 days on the Missouri Bend Levee, and 2 days on the St. Gabriel Levee, leaving 31 days delay due to high water which he held the contractor could not have foreseen. He also found that the plaintiff had been delayed by high water after the contract period 162 days on the St. Gabriel Levee, and none on the Missouri Bend Levee, and that the normal expected delay on the St. Gabriel Levee was 98 days. He held that the plaintiff was entitled to a remission of liquidated damages for the unexpected delay due to high water in the sum of $1,900, and this sum was remitted. The defendant retains the balance of $3,900, liquidated damages for 195 days of delay, of which 183 days was delay due to high water, which the contracting officer held the contractor should have foreseen. The balance of 12 days was delay due to other causes hereafter to be mentioned.

The plaintiff says that it is entitled to recover the amount withheld for delay due to high water whether or not it could have been foreseen.

Article 9 of the contract provides for the deduction of liquidated damages for delay, with this proviso:

Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather * * *.

This contractor, therefore, could not be penalized for delay due to unforeseeable causes. Among the things which
28 are listed as unforeseeable causes are "acts of God, or of the public enemy, acts of the Government, fires, floods," etc. It, therefore, would seem to follow that no amount should have been deducted for delay due to a flood. But the defendant contends that the proviso refers only to such floods as are unforeseeable. We think this position is untenable. The proviso does not mention unforeseeable floods, unforeseeable acts of God, unforeseeable acts of the public enemy, unforeseeable acts of the Government, unforeseeable fires, etc. All these things are unforeseeable. The proviso mentions them as among the things that are unforeseeable. The only cause that is qualified is severe weather; the weather must be unusually severe. Floods are not qualified. Any flood is to be treated as an unforeseeable cause.

The construction of the word "including" is in harmony with the construction placed upon it by the courts in many cases. See Montello Salt Co. v. Utah, 221 U. S. 452, and many other cases cited in Vol. 20 of "Words and Phrases," page 443, et seq.

This identical proviso was so construed in Albina Marine Iron Works, Inc. v. United States, 79 C. Cls. 714.

If there is any doubt about the correctness of this construction, that doubt ought to be resolved against assessing the penalty.

The other question is whether or not high water which stopped the work is to be considered as a flood, even though it did not overflow the levee. Webster's dictionary defines a flood as "A great flow of water; a body of moving water; the flowing stream, as of a river; especially a body of water rising, swelling, and overflowing land." The word frequently signifies an overflow, but it is not restricted thereto. Here we are convinced that it should not be so restricted because it is mentioned as one of the causes of delay and, therefore, means any rise in the water which caused cessation of work and delayed the contractor in the completion of the work. Apparently the water overflowed the banks of the river, but did not overtop the levee.

Another delay for which liquidated damages were deducted was alleged to have been due to the requirement by the

29 contracting officer that the work begin at the upstream portion of the work instead of the downstream portion, as the contractor desired. This is alleged to have necessitated the building of a tie-in levee in order to take care of approaching high water. Had the work started at the down-stream end, it is alleged this would not have been necessary.

It was well within the province of the contracting officer to order the work to start at the upstream end of the construction. Paragraph 17 of the specifications reads:

17. Order of work.—The contracting officer shall have power to designate the exact localities at which the work shall be prosecuted; also the proportion of the force that shall be worked at any designated locality; and the time when sodding and other incidental work shall be done.

Moreover, when the contracting officer on October 27, 1931, directed the plaintiff to begin construction at the upstream end of the work, the plaintiff replied on October 30, 1931, agreeing to do so. No protest against the order was entered.

The plaintiff also complains that it was unnecessary to build the tie-in levee, but that it should have been permitted to continue with the construction of the main levee.

It was within the discretion of the contracting officer to order the construction of this tie-in levee. Paragraph 37 of the specifications provides in part:

In anticipation of destructive floods during the progress of the work, the contracting officer may require a * * * temporary protective levee to be built in front of the work, upon such location and of such dimensions as he may direct. If such a protective levee is built the contractor will be paid the contract price per cubic yard * * *.

When the building of this tie-in levee was ordered the river was rising at the rate of about a foot a day, and flood stages were predicted. The plaintiff believed that it could complete the construction of the levee before the flood arrived. But the contracting officer was of a different opinion, or at least thought that it would be risky to take this chance. This was a matter committed to his judgment.

Furthermore, when the plaintiff was first directed to build this tie-in levee, it orally protested and requested authority
30 to continue working along the new levee line; but this request was refused and the plaintiff was directed to build the tie-in levee as ordered. Thereupon, plaintiff proceeded to build it without further protest, and without any appeal to the head of the department. Under such circumstances the plaintiff cannot complain here of the order of the contracting officer.

Plaintiff is entitled to recover of the defendant liquidated damages deducted for the 183 days it was delayed by high water, or a total of $3,660.00. It is so ordered.

JONES, Judge; LITTLETON, Judge; and WHALEY, Chief Justice, concur.

MADDEN, Judge, dissenting in part:

Plaintiff claims the right to an extension of the time of performance of the contract for the number of days that it was delayed by high water which made work on the project impossible, even though such high water and the greater part of its duration was normal, seasonal, and anticipated. Plaintiff bases this argument upon the following portion of Article 9 of the contract:

Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: * * *.

I think plaintiff's interpretation of this provision is not tenable. The whole purpose of the proviso is to prevent contractors from being penalized by forefeiture of their contracts or by the assessment of liquidated damages because they encounter unanticipated obstacles to prompt performance. The proviso is advantageous to the Government also because it enables bidders to submit bids based, so far as the perils of forfeiture and liquidated damages are concerned, on normal and foreseeable events, rather than upon events which might occur, although they probably will not. In accordance with this purpose, and with the normal meaning of the words in the sequence in which they are here found, the
31 events listed under the "including" phrase must each be intended to be unforeseeable. Not every fire or quarantine or strike or freight embargo should be an excuse for delay under the proviso. The contract might be one to excavate for a building in an area where a coal mine had been on fire for years, well known to everybody, including the contractor, and where a large element of the contract price was attributable to this known difficulty. A quarantine, or freight embargo, may have been in effect for many years as a permanent policy of the controlling government. A strike may be an old and chronic one whose settlement within an early period is not expected. In any of these situations there would be no possible reason why the contractor, who of course anticipated these obstacles in his estimate of time and cost, should have his time extended because of them.

The same is true of high water or "floods." The normally expected high water in a stream over the course of a year, being foreseeable, is not an "unforeseeable" cause of delay. Here plaintiff's vice-president testified that in making its bid plaintiff took into consideration the fact that there would be high water and that when there was, work on the levee would stop. Without this testimony we would have known that plaintiff did so. Its time was extended, in the contract, for normal and foreseeable high water. There is no reason why we should grant a further extension of the same number of days for the same cause. Allowance should be made, as was done by the contracting officer, only for the number of days of unforeseeable high water.

I do not regard the provision for an agreed sum as liquidated damages for non-completion of the work at the time set by the contract as penal in its nature, so as to justify a forced interpretation of the language of the contract, leaving the defendant without remedy for the breach of the contract, according to its normal meaning.

33 VI. *Judgment*

At a Court of Claims held in the City of Washington on the 1st day of June A. D. 1942, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of three thousand six hundred sixty dollars ($3,660.00).

35 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1942

Supreme Court of the United States

No. 366, October Term, 1942

Order allowing certiorari

Filed October 19, 1942

The petition herein for a writ of certiorari to the Court of Claims is granted and the case is transferred to the summary docket. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 366

In the Supreme Court of the United States

October Term, 1942

The United States, petitioner
v.
Brooks-Callaway Company

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 366

THE UNITED STATES, PETITIONER

v.

BROOKS-CALLAWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on June 1, 1942.

OPINIONS BELOW

The opinions of the Court of Claims (R. 18–22) are not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered June 1, 1942. Jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the proviso to Article 9 of the Standard Form of Government Construction Contract which

provides that a contractor shall not be charged with liquidated damages for delays owing to unforeseeable causes beyond the control and without the fault of the contractor, including floods, contemplates the remission of liquidated damages for delay caused by high water which interferes with the progress of the work but which is customary and foreseeable.

CONTRACT PROVISIONS INVOLVED

Article 9 of the Standard Form of Government Construction Contract (R. 6; Fdg. 5, R. 13-14) provides:

> ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be

on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contrac-

tor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

STATEMENT

Respondent brought suit in the Court of Claims (R. 1-4) to recover the sum of $3,800, which had been deducted from the contract price as liquidated damages for delay in the completion of a contract for the construction of levees on the Mississippi River. It contended that liquidated damages had been improperly assessed because it had been delayed in the completion of the work by high water, among other causes.[1] The material facts as found by the Court of Claims (R. 12-17) are as follows:

Brooks-Callaway Company entered into a Standard-Form contract with the United States on October 12, 1931, whereby, for the consideration of 12¢ per cubic yard place measurement, it agreed to furnish all labor and material and perform all work required for the construction of the Missouri Bend Levee, Lots A, B, and C, containing approximately 2,300,000 cubic yards, and the St. Gabriel Levee, Lots A, B, and C, containing approximately

[1] The other causes alleged were failure of the United States to procure a necessary right-of-way and the requirement of the contracting officer early in 1933 that the company build a tie-in levee between the new construction and an old levee, in anticipation of spring floods (R. 2). The court below decided against respondent on these two claims (R. 20).

1,750,000 cubic yards, both of which projects were located on the Mississippi River. The contract provided that the work should be completed within 450 calendar days after the receipt of notice to proceed (Fdg. 2, R. 12). Such notice was given on October 22, 1931, and accordingly January 14, 1933, became fixed as the contract date of completion (Fdg. 6, R. 14). Article 9 of the contract contained the usual provisions as to delays and damages, and the specifications provided that liquidated damages at the rate of $20 a day should be assessed for every day in excess of the contract time that the contractor failed to complete the work (R. 6, 7; Fdg. 5, R. 13–14).

The Missouri Bend Levee was completed on March 22, 1933, and the St. Gabriel on August 25, 1933 (Fdg. 6, R. 14). Liquidated damages in the amount of $5,800 for a total delay of 290 days were thereupon assessed against respondent and withheld from the contract price. Respondent protested against this deduction, and, upon consideration, the contracting officer found that respondent had been delayed by high water during the contract period for a total of 112 days on the Missouri Bend Levee, and for 4 days on the St. Gabriel Levee. He further found that it had been delayed by high water after the contract period for 162 days on the St. Gabriel Levee. He held that of the total delay owing to high water, 183 days were owing to conditions normally to be expected on account of high

water and that 95 days were unforeseeable.[2] He therefore recommended that liquidated damages in the sum of $1,900 be remitted but that the balance of $3,660 be retained. Settlement was made on that basis. (Fdg. 7, R. 14.)

The Court of Claims concluded that liquidated damages should not have been assessed against respondent for any of the delay owing to high water (278 days) (R. 18, 19), and gave judgment in favor of respondent (R. 22) for $3,660, representing the 183 days of delay which the contracting officer found resulted from foreseeable high water.[3] Judge Madden dissented (R. 21–22).

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[2] The contracting officer found (Fdg. 8, R. 21-22) that the remaining delay, being the difference between the total delay of 380 days and the delay of 278 days owing to high water, was not excusable on account of failure by the Government for a period to procure a necessary right-of-way or on account of the requirement made by the contracting officer in January 1938 that the contractor build a tie-in levee. On these points the court below sustained the contracting officer (see Fdgs. 9-13, R. 16-17; R. 19-20).

[3] The Government, in its exceptions to the Court of Claims Commissioner's proposed findings of fact, requested an additional finding by the court adopting and approving the contracting officer's determinations concerning the foreseeable delay from high water on the Missouri Bend and St. Gabriel construction. The court omitted to make any finding on this issue, presumably on the theory, expressed in its opinion (R. 19), that the question of foreseeability of high water was not material. See Defendant's Exceptions to Commissioner's Findings, dated November 25, 1941.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that under Article 9 of the Standard Form of Government Construction Contract liquidated damages cannot be assessed against a contractor for delay caused by high water where such was customary and foreseeable and where an ordinarily prudent person would have anticipated such high water and would have made allowance therefor in computing the time within which the contract was to be completed.

2. In entering judgment for the respondent.

REASONS FOR GRANTING THE WRIT

The Court of Claims held that any high water which interfered with the progress of construction was a "flood" within the meaning of the proviso in Article 9 of the contract. And it held that the specific inclusion of "floods" among unforeseeable causes of delay exonerated the contractor from liquidated damages for delay owing to "flood" although this cause of delay could have been foreseen. We submit that the court below has decided an important question in the interpretation of the Standard Form of Government Construction Contract in a way which is untenable, being in conflict with the plain language of the contract itself, with the intent that should be ascribed to the parties to the contract, and with the ordinary rules governing interpretation of contracts.

1. The plain language of the proviso to Article 9 precludes the interpretation placed upon it by the court below. The Court of Claims determined that high water constituted a "flood" within the meaning of the contract wherever the high water interfered with and delayed construction. It would seem that the term "flood" should not be taken to denote such high water; rather, it should be taken to signify abnormally great flow marked by the element of unexpectedness.[4] That the term "flood" in the contract under consideration imports the idea of unforeseeability is manifested by the framing of the proviso in Article 9. That proviso states that the contractor shall not be "charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, *including*, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather . * * *." [Italics supplied.] It seems clear that these specific exempting causes do not enlarge the general category of "unforeseeable causes" as it would ordinarily be understood, but serve to illustrate the class of causes which excuse delay under the pro-

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[4] The criterion of relative magnitude of flow alone would be unsatisfactory in determining whether a particular occurrence of high water amounted to a "flood".

viso. *Cf. Montello Salt Co.* v. *Utah*, 221 U. S. 452 466; *The Betsey and Charlotte*, 4 Cranch 443, 452.

The specific examples should not be thought operative without the qualification of unforeseeability, and so be held to impose the interpretation on the phrase "unforeseeable causes" that it shall include anyway these specific exempting causes of delay without regard to foreseeability. It is to be noted that the general category is qualified by the requirement that the excusing causes be "beyond the control and without the fault or negligence of the contractor" as well as "unforeseeable". It is apparent that the former qualification was intended to modify the specific causes. For example, fires owing to the contractor's negligence or strikes resulting from the contractor's willful refusal to comply with the National Labor Relations Act would not relieve from the payment of liquidated damages if delay resulted. On the same principle the qualification of unforeseeability must be read into the specific illustrations following the statement of the general category, so that only unforeseeable "floods" excuse delay. For this reason mere high water which interferes with and delays construction is not a "flood" within the meaning of the contract; the element of unforeseeability is requisite.[5]

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[5] For delay caused by high water which interfered with work and was unforeseeable the contracting officer made allowance in this case of $1,900 liquidated damages, representing 95 days' delay (Fdg. 7, R. 14).

2. The construction given to the proviso by the court below fails to give effect to the intent of the parties. The purpose of the proviso in Article 9 is to restate the general rule as to impossibility of performance, thus obviating any dispute as to whether the doctrine of impossibility was intended to apply and does apply. Cf. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184. Accordingly the proviso operates independently of general law, to protect the contractor against the assessment of liquidated damages for delays resulting from unforeseeable causes beyond his control and for which he could not reasonably be expected to make allowance in preparing his bid.* In the absence of such a provision it is clear that the contractor would be held liable for a delay in performance resulting from causes which could reasonably have been anticipated even though they were not owing to his fault. See Williston, *Contracts* (Rev. ed., 1938) secs. 1931, 1959; American Law Institute, *Restatement, Contracts*, secs. 457, 467. There is nothing in the nature of the contract here under consideration which suggests an intention to change the rule of law in that respect. As Judge Madden pointed out

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* Probably the effect of this proviso is to accord more liberal treatment to the contractor than he would receive at common law without it. For example, it is generally held that mere difficulty in construction owing to weather conditions does not excuse delayed completion. See Williston, *Contracts* (Rev. ed.) sec. 1964; American Law Institute, *Restatement, Contracts*, secs. 467, illus. 2; Page, *Contracts* (2d ed.) sec. 2703.

in his dissenting opinion (R. 22), the uncontradicted evidence in this case discloses that the contractor in making his bid took into consideration that there would be high water and that work on the levee would stop for its duration. It is also undisputed that Army engineers in preparing their estimate of the time which would be required for completion of the levee made allowances for the period during which work could not be continued owing to high water.[7] The proviso of Article 9 could hardly have been intended so to modify the general contract principles of impossibility as to extend the term of the contract on account of anticipated events for which provision was already made by both parties in fixing the period of performance and the contract price; circumstances existing or within the contemplation of the parties when a contract is made are strongly persuasive in its interpretation. See Williston, *op. cit. supra*, sec. 1968.

Moreover, the proviso operates to the mutual advantage of the parties. The contractor is in a position to estimate more closely both the time within which and the price at which he can perform the contract if he knows that unforeseeable events of a certain character will not compel him to pay liquidated damages for delay, and the Government in turn obtains the benefit of a lower

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[7] The court below made no finding in this respect, apparently on the theory that the question of foreseeability was immaterial. See fn. 3, p. 6, *supra*.

bid and the promise of a more prompt performance. The reason for the insertion of such a proviso fails when it is known to the contracting parties[1] that a particular occurrence, such as high water, is reasonably probable during the progress of the work and is likely to interfere with it. An ordinarily prudent contractor makes and is expected to make allowances for events which he reasonably may expect to occur.

For the foregoing reasons we submit that the Court of Claims construed erroneously respondent's contract with the United States and that on proper construction that contract provides for remission of liquidated damages for delay only where the delay was occasioned by an unforeseeable event.[2]

3. The question presented by this case is one of importance. We are advised by the War Department and by the Navy Department that thousands of construction and supply contracts containing provisions for liquidated damages similar to that

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[1] It is a matter of common knowledge that high water occurs in the Mississippi River at certain periods of the year, interfering with levee construction.

[2] The court below relied upon the rule of interpretation that any doubt should be resolved against the assessment of a penalty. This Court, however, has repeatedly held that a provision for liquidated damages in a government contract is not a penalty. Cf. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184, 187, 189–190; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105.

here involved,[10] in which the damages are fixed at from $5 to $1,200 per day, have been made by those Departments for the Government in recent years and that a very great percentage of them are still in effect at the present time. Both departments have stated that it is impractical, owing to the magnitude of the task, for them to submit figures with respect to pending or potential claims for remission of liquidated damages under the delay provisions of Standard-Form contracts.

The liquidated-damages clause is one of the means adopted by the Government to procure prompt completion of contracts. Coupled with this clause is another, conferring on the Government the right to terminate a contract where the contractor fails to prosecute his work with reasonable diligence; the right to terminate for delay is subject to the same proviso as is the right to collect liquidated damages for delay. Accordingly, under the construction given to the proviso by the Court of Claims, the Government would be deprived of its most effective sanctions to procure completion of the work by the contractor within the contract time and of its effective means to provide otherwise for completion of the work, if any of the specific causes enumerated in the proviso had occurred during the course of the construction even though the occurrence was foreseeable.

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[10] Article 5 of the Standard Form of Government Supply Contract contains provisions substantially similar to those of Article 9 in the Construction Contract.

If the decision below should stand, it would be too late now to reform contracts which have already been entered into or to introduce any saving clauses in the contracts which have been completed and in which claims for liquidated damages have been asserted during the past six years. Thus the effect of the Court of Claims decision, aside from its tendency to hinder the Government in procuring prompt completion of contracts, would be to furnish a basis for the assertion of many claims for the remission of liquidated damages involving large sums of money.

CONCLUSION

For the reasons stated above it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1942.

U. S. GOVERNMENT PRINTING OFFICE 1942

No. 366

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE UNITED STATES, PETITIONER

v.

BROOKS-CALLAWAY COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the Court of Claims (R. 18–22) are not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered June 1, 1942 (R. 22). The petition for a writ of certiorari was filed on September 1, 1942, and was granted on October 19, 1942. Jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the proviso to Article 9 of the Standard Form of Government Construction Contract

which provides that a contractor shall not be charged with liquidated damages for delays owing to unforeseeable causes beyond the control and without the fault of the contractor, including floods, contemplates the remission of liquidated damages for delay caused by high water which interferes with the progress of the work but which is customary and foreseeable.

CONTRACT PROVISION INVOLVED

Article 9 of the Standard Form of Government Construction Contract (R. 6; Fdg. 5, R. 13–14) provides:

> ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the

work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided, That the* right of the *contractor* to proceed *shall not be* terminated or the contractor *charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further,* That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall

be final and conclusive on the parties hereto. [Italics ours.]

STATEMENT

Respondent brought suit in the Court of Claims (R. 1–4) to recover the sum of $3,900, which had been deducted from the contract price as liquidated damages for delay in the completion of a contract for the construction of levees on the Mississippi River. It contended that liquidated damages had been improperly assessed because it had been delayed in the completion of the work by high water, among other causes.[1] The material facts as found by the Court of Claims (R. 12–17) are as follows:

Brooks-Callaway Company entered into a Standard Form contract with the United States on October 12, 1931, whereby, for the consideration of 12¢ per cubic yard place measurement, it agreed to furnish all labor and material and perform all work required for the construction of the Missouri Bend Levee, Lots A, B, and C, containing approximately 2,300,000 cubic yards, and the St. Gabriel Levee, Lots A, B, and C, containing approximately 1,750,000 cubic yards, both of which projects were located on the Mississippi

[1] The other causes alleged were failure of the United States to procure a necessary right-of-way and the requirement of the contracting officer early in 1933 that the company build a tie-in levee between the new construction and an old levee, in anticipation of spring floods (R. 2). The court below decided against respondent on these two claims (R. 20).

River. The contract provided that the work should be completed within 450 calendar days after the receipt of notice to proceed. (Fdg. 2, R. 12.) Such notice was given on October 22, 1931, and accordingly January 14, 1933, became fixed as the contract date of completion (Fdg. 6, R. 14). Article 9 of the contract (supra, pp. 2–4) provided for the deduction of liquidated damages for delay in completion of the work unless the delay was "due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather." The specifications of the contract provided that liquidated damages at the rate of $20 per day should be assessed for every day of delay in completion in excess of the contract time. (R. 6, 7; Fdg. 5, R. 13–14.)

The Missouri Bend Levee was completed on March 22, 1933, and the St. Gabriel on August 25, 1933 (Fdg. 6, R. 14). Liquidated damages in the amount of $5,800 for a total delay of 290 days were thereupon assessed against respondent and withheld from the contract price. Respondent protested against this deduction, and, upon consideration, the contracting officer found that respondent had been delayed by high water during the contract period for a total of 112 days on the Missouri Bend Levee, and for 4 days on

the St. Gabriel Levee. He further found that it had been delayed by high water after the contract period for 162 days on the St. Gabriel Levee. He held that of the total delay of 278 days owing to high water, 183 days were owing to conditions normally to be expected on account of high water and that 95 days were unforeseeable.[2] He therefore recommended that liquidated damages in the sum of $1,900 be remitted (representing 95 days of unforeseeable delay at $20 per day) but that the balance of $3,900 be retained. Payment was made on that basis. (Fdg. 7, R. 14.)

The Court of Claims concluded that liquidated damages should not have been assessed against respondent for any of the 278 days of delay owing to high water (R. 18, 19) on the ground that the high water was a flood and under the contract all floods were unforeseeable. Judgment was given in favor of respondent (R. 22) for $3,660, representing the 183 days of delay which the contracting officer had found resulted from foreseeable high water. Judge Madden dissented (R. 21–22), and in the course of his dissent pointed out that re-

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[2] The contracting officer found (Fdg. 8, R. 14–16) that the remaining delay, being the difference between the total delay of 290 days and the delay of 278 days owing to high water, was not excusable on account of failure by the Government for a period to procure a necessary right-of-way or on account of the requirement made by the contracting officer in January 1933 that the contractor build a tie-in levee. On these points the court below sustained the conclusions of the contracting officer (see Fdgs. 9–13, R. 16–17; R. 19–20).

spondent's vice president had testified that in making its bid respondent had taken into consideration the fact that there would be high water which would cause work on the levee to stop.

SPECIFICATION OF ERRORS

The Court of Claims erred:

1. In holding that under Article 9 of the Standard Form of Government Construction Contract liquidated damages cannot be assessed against a contractor for normal expected delay caused by high water that was customary and reasonably foreseeable.

2. In entering judgment for the respondent.

SUMMARY OF ARGUMENT

The proviso of Article 9 of the Standard Form of Government Construction Contract relieves contractors from liquidated damages only as to delays caused by "unanticipated obstacles to prompt performance" (R. 21). In its absence, contractors would be liable for delays in performance caused by unforeseeable events, subject to some possible but vaguely defined exceptions which could not be established without litigation. The proviso was intended to do no more than place all delays from unforeseeable causes in the class of excusable delays. The specifically listed causes were designed to illustrate the all-inclusiveness of the unforeseeable causes intended to be covered, not to expand the unforeseeable causes to include some foreseeable causes.

The unreasonable consequences flowing from the construction placed on the proviso by the court below repel the suggestion that that is the intended construction. Among other such consequences of that construction is the consequence that it would virtually nullify the completion date provision in government contracts.

In any event, the term "floods" cannot be extended to include expected high water. The term has a connotation of unexpectedness which is reinforced by the context in which it is here used. Thus understood the term "floods" does not include foreseeable and expected high water.

ARGUMENT

ARTICLE 9 EXCUSES DELAYED PERFORMANCE ONLY WHERE THE DELAY IS DUE TO UNFORESEEABLE CAUSES

Respondent agreed to build two levees within 450 days (R. 12), and further agreed that if it failed to complete the work within that time the United States could either terminate the contract or permit respondent to continue work subject to the retention by the United States of liquidated damages (Article 9, *supra*, pp. 2–4). Had the contract provided no more, respondent would have been subject to these sanctions for any delay caused by unforeseeable events[3] except possibly

[3] *Maryland Dredging Co.* v. *United States*, 241 U. S. 184; *Porto Rico Sugar Co.* v. *Lorenzo*, 222 U. S. 481; *Jones* v. *United States*, 96 U. S. 24; *The Harriman*, 9 Wall. 161; *Dermott* v. *Jones*, 2 Wall. 1.

those which were acts of God.[4] Whether an unforeseeable flood is an act of God and if so whether it would excuse delay appears to be in law an open and hence litigable question.[5] That respondent would also have assumed liability for delay due to causes which were or should have been foreseen is too clear for question.[6]

However, the Standard Form of government contract, to which respondent was a party, relieves the contractor of liability for delays "due to unforeseeable causes beyond the control and without the fault or negligence of the contractor * * *." The fairness of such a provision is manifest, and it has the dual advantage of avoiding litigation and of making government contracts more attractive than they otherwise would be, thus affording lower bids and a greater selection of bidders.

In order that a narrow construction (such as limiting it to acts of God) may not be placed on

[4] *Columbus Ry. & Power Co.* v. *Columbus*, 249 U. S. 399, 412 (dictum); *Dermott* v. *Jones*, 2 Wall. 1, 7 (dictum); see, however, *Phoenix Bridge Co.* v. *United States*, 38 C. Cls. 492, affirmed 211 U. S. 188, *Jones* v. *United States*, *supra*, note 3. Compare *Day* v. *United States*, 245 U. S. 159.

[5] In the sense in which lightning is an act of God, a flood is also one, but so are fires of indeterminate origin and adverse weather conditions, which nonetheless are risks assumed by a contractor. *Jones* v. *United States*, *supra*, note 3; Williston *Contracts* (Rev. ed.), sec. 1964. Compare *Day* v. *United States*, *supra*, note 4.

[6] Compare *Carnegie Steel Co.* v. *United States*, 240 U. S. 156.

this clause, Article 9 proceeds to particularize a few of the unforeseeable interferences against which the contractor does not guarantee: thus it describes these unforseeable causes as "including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes." From the context of Article 9 as well as from its purpose, it seems apparent enough that this language was designed to show that the reference to unforeseeable causes was all-inclusive, and whatever their nature if the causes were unforeseeable the contractor's delay was to be excused. This provision was thus not intended to relieve respondent from liability for liquidated damages on account of its delay, since the delay here was caused by foreseeable high water.

The Court of Claims, however, was of the opinion that the word "including" was a word of addition,[7] not of illustration, and that the effect of Article 9 was to define as "unforeseeable" all causes listed, such as fires, floods, strikes, and delays of subcontractors due to any of those causes, even though they be in a particular case foreseeable or, for that matter, foreseen. As we

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[7] The Court of Claims cited as authority *Montello Salt Co. v. Utah*, 221 U. S. 452, in which the State of Utah argued that the word "including" in a government grant was a word of addition. This Court held that it was not. See also *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95, 100.

have seen, this construction is inconsistent with the apparent purpose of the provision. In addition, it has such unreasonable consequences as to repel the possibility that it is the intended construction. Moreover, the particular word (floods) which occasioned this construction itself has connotations of unexpectedness which should prevent its being held to include foreseeable high water.

1. THE UNREASONABLE CONSEQUENCES OF THE LOWER COURT'S CONSTRUCTION OF ARTICLE 9 SHOW THAT THE PARTIES DID NOT INTEND THAT SUCH A CONSTRUCTION SHOULD BE ADOPTED

The decision below holds that delay due to any of the expressly listed causes is excusable delay even though the cause be not in fact "unforeseeable * * * beyond the control and without the fault or negligence of the contractor." Logically applied, the decision would even excuse listed delays which were within the control or caused by the fault of the contractor. Among the listed causes are "fires, floods, * * * strikes, * * * or delays of subcontractors due to such causes." Under the construction adopted below, a contractor is free to make a low bid in which profit is entirely dependent on his using highly inflammable materials in an existing factory which is not properly fireproofed. If a fire destroys the factory, the contractor can then wait for his factory to be rebuilt, and if that wait causes the government work to be delayed beyond the contract period, the delay is excusable even though reasonably foreseeable. Or, as another

example, if a contractor in wilful violation of the National Labor Relations Act discriminates against union labor in employment and advancement policies, and strikes result, delays from those strikes will be excusable. These causes of delay are foreseeable, and furthermore are not "beyond the control" and are not "without the fault * * * of the contractor," yet under the decision below they would be excusable causes because they are expressly listed. And the United States would be powerless even to terminate the contract, since under Article 9 the contract cannot be terminated, or liquidated damages retained, if the delay is from an excusable cause.

The foregoing examples show the unreasonable consequences, clearly not intended, which can flow from Article 9 unless it be construed to excuse only those delays which are caused by unforeseeable events.

Hypothetical examples are not needed. The facts of the instant case demonstrate the point. The instant contract called for completion within 450 days (R. 12). Under normal conditions there would be high water during 183 days (R. 18), thus leaving 267 days in which high water would not interfere with the work. It could, therefore, be foreseen that the contractor would have only 267 working days in which to complete the levees. It takes more men and more equipment to build a levee in 267 days than it does in 450 days since

the same amount of work must be done in a shorter time. Thus more men must be employed and more equipment obtained by the contractor who plans to build a levee in 267 working days than by the one who plans on 450 working days. The contractor who counts on having 267 working days will therefore have more men and equipment lying idle during high water than the contractor who counts on 450 working days. As a result the stand-by charges of the former contractor will be higher than those of the latter. Since the former will anticipate these charges he will budget for them as well as for the cost of the extra equipment in preparing his bid. Thus, the contractor who counts on 450 working days can underbid the one who knows he cannot expect more than 267 working days. The result is that the contractor who counts on having 450 working days will get the contract, and if any of the anticipated high water occurs the contract will not be completed on time. Under Article 9 as construed below, the United States will be unable either to terminate the contract or to retain liquidated damages.

The inevitable effect of the construction adopted below would be to make a mockery of the completion date in a Standard Form contract wherever foreseeable delays occur due to any of the specifically listed causes. The bidder who ignores the possibility of delays from such causes can usually be low bidder, so the contract will go

to one who, if the expected delays occur, cannot complete within the specified time. Such a construction is frustrative of the purpose of Article 9. It certainly is not the intended construction.

Albina Marine Iron Works v. *United States*, 79 C. Cls. 714, relied on by respondent, appears to be distinguishable. In that case the contracting officer found that the delay was due to "unusual weather conditions," but he held that the contractor should have anticipated some delay from this source. There may thus have been a conflict between his findings since "unusual" weather unless found to the contrary connotes unforeseeable weather, and the court so held. On any other construction, the *Albina Marine Iron Works* decision would be wrong.

2. THE DELAY HEREIN WAS NOT DUE TO "FLOODS," SINCE THE WORD "FLOODS" CONNOTES UNEXPECTEDNESS

The conclusion that anticipated high water can constitute "floods" within the intendment of Article 9 is erroneous.[*] There is authority to the

[*] The conclusion of the lower court that the high water herein constituted a flood is unsupported by the facts, which show only that it was "high water." The Court of Claims assumed (R. 19) that this high water overflowed the banks of the river, though not the levee. Even on this assumption this high water would not be a flood. "Flood waters are those which escape from a stream * * * and overflow the adjacent territory." *LeBrun* v. *Richards*, 210 Cal. 308, 315; 291 P. 825. To the same effect, see *Poole* v. *Sun Underwriters Ins. Co.*, 65 S. D. 422, 426, 274 N. W. 658; *Mogle* v. *Moore*, 16 Cal. (2d) 1, 9, 104 P. (2d) 785; *Webster's New International Dictionary* (2d ed.), p. 970. However, a reversal on this narrow ground alone would defeat the object for which the Government sought review. See Pet. 12, 13.

effect that the word "floods" does not include normal, seasonal high water.[9] The context in which the word is used here strongly suggests that it was not intended to include such high water. Being used in connection with unforeseeable causes, the word must have been thought to refer to unforeseeable high water, not to normal, seasonal, and foreseeable high water. Therefore, the court below erred in concluding that the delay herein was caused by "floods" as that term is used in Article 9. That being so and the delay having in fact been foreseeable, the delay was not excused by Article 9 and the United States properly retained liquidated damages therefor.

CONCLUSION

For the foregoing reasons, therefore, it is respectfully submitted that the decision of the court below is erroneous and should be reversed.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
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DAVID L. KREEGER,
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Attorneys.

NOVEMBER 1942.

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[9] *Herminghaus* v. *Southern California Edison Co.*, 200 Cal. 81, 88, 252 P. 607; *Mammoth Gold Dredging Co.* v. *Forbes*, 39 Cal. App. (2d) 739, 752, 104 P. (2d) 131.

U. S. GOVERNMENT PRINTING OFFICE: 1942

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 366.

THE UNITED STATES, PETITIONER,

v.

BROOKS-CALLAWAY COMPANY,

Brief Opposing the Granting of Petition.

GEORGE R. SHIELDS,
HERMAN J. GALLOWAY,
JOHN W. GASKINS,
FRED W. SHIELDS,
Attorneys for Respondents.

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OCTOBER TERM, 1942.

No. 366.

THE UNITED STATES, *Petitioner*,

v.

BROOKS-CALLAWAY COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Opinion Below.

The opinion of the Court of Claims (R. 18-22) is not yet officially reported.

Jurisdiction.

The judgment of the Court of Claims was entered June 1, 1942 (R. 22). Jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

Question Presented.

Whether the proviso to Article 9 of the contract which provides that a contractor shall not be charged with liquidated damages for any delays due to unforeseeable causes beyond the control and without the fault of the contractor, including acts of God, or of the public enemy, acts of the Government, fires, floods, etc. authorizes the contracting officer to charge liquidated damages for delay to the work resulting from high water which he considered to be foreseeable.

Contract Provisions Involved.

Article 9 of the contract is set forth in the petition for writ of certiorari (pp. 2–4) to which reference is hereby made.

Statement.

The statement of facts contained in the petition for writ of certiorari (pp. 4–6) fairly sets forth the facts of the case.

Summary of Reasons for Denying the Writ.

The writ of certiorari should be denied because:

1. The case does not involve a question of sufficient public importance to justify its consideration by this Court.

2. The decision of the Court of Claims is correct and sound.

Argument.

1. The case does not involve a question of sufficient public importance to warrant consideration by this Court.

The amount involved, \$3,660, is small.

Although petitioner now contends (petition for writ of certiorari pp. pp. 12, 13) that the question is one of great importance involving thousands of Government contracts, its present position is contradicted by its past conduct. Over eight years ago the Court of Claims decided against the petitioner upon the question now presented. *Albina Marine Iron Works* v. *United States* 79 C. Cls. 714, 722. Petitioner did not then ask for certiorari, and has not considered the question sufficiently important to warrant revision of Article 9 of the standard form of Government contract. It therefore does not become petitioner to complain (petition for Writ of Certiorari, p. 14) that it is now too late to reform contracts which have already been entered into or to introduce saving clauses in the contracts which have been completed and in which claims for liquidated damages have been asserted during the past six years.

Further evidence of the unimportance of the question involved is the fact that, in so far as respondent has been able to

determine, only once before has the question been raised in the many years that the Standard Article 9 has been in force. *Albina Marine Iron Works* v. *United States*, *supra*.

2. The decision of the Court below is correct and sound.

In the petition for writ of certiorari (pp. 8-9) it is urged that the term "flood," as used in Article 9, does not include high water which suspends the contract work, and further, that Article 9 does not contemplate the remission of liquidated damages for delay resulting from flood unless the flood was unforeseeable.

It is submitted that these contentions are without merit. In the first place, the determination by the court below (R. 19) that the term "flood" is broad enough to include high water which overflows the banks of the river is reasonable.

Second, well established rules of interpretation support the decision of the court below (R. 19) that under Article 9 of the contract a flood is regarded in and of itself as being unforeseeable.

Article 9 provides that the contractor shall not be charged with liquidated damages for "any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, *including*, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather" (italics supplied). It is clear that by using the word "including" petitioner intended that floods and the other specified causes of delay should be examples of unforeseeable delays for which liquidated damages should not be charged. See *Montello Salt Co.* v. *Utah*, 221 U. S. 452. There is no merit to the argument (petition for writ of certiorari, p. 8) that such an interpretation enlarges the general category of unforeseeable causes. Floods, strikes, fires and the other specific causes of excusable delay set forth in Article 9 are by nature unforeseeable with any degree of accuracy, either as to the time of their occurring or as to their consequences. To interpret Article 9 as relieving a contractor from liquidated

damages for delays resulting from such causes does not, therefore, enlarge the general category of "unforeseeable causes."

Only one of the specified causes for relief is qualified in any way. That one is "severe weather," which is qualified by the word "unusually." The absence of qualification of the other causes is a strong indication that they were regarded in themselves as being unforeseeable. The rule of *expressio unius est exclusio alterius* applies.

Even if Article 9 be considered ambiguous, the decision of the court below is correct. It is well established that ambiguous language in a written instrument should be construed against the party preparing it. *The Insurance Companies* v. *Wright*, 1 Wall. 468; *American Surety Co.* v. *Pauly*, 170 U. S. 133, 144.

In addition, by failing to petition for certiorari in *Albina Marine Iron Works* v. *United States*, *supra*, and by failing to revise Article 9 of the Standard Form of Government Contract in the eight years following the decision in that case, petitioner must be considered as having acquiesced in the interpretation then given to Article 9 by the Court of Claims. Cf. *Hecht* v. *Malley*, 265 U. S. 144, 153.

In the petition for writ of certiorari (pp. 10–11) it is stated that the purpose of the proviso to Article 9 is to restate the general rule of impossibility of performance and to remove any doubt whether the doctrine of impossibility was intended to apply. It is clear, however, that under Article 9, relief from liquidated damages is not based upon the doctrine of impossibility. For example, there is no dispute that a week's delay resulting from a strike or from unusually severe weather would be grounds for an extension of time under Article 9. It can not be seriously contended, however, that such delays would relieve a contractor from performance of his contract under the doctrine of impossibility or that in the absence of Article 9 such causes would excuse delayed performance. *Maryland Dredging Company* v. *United States*, 241 U. S. 184, cited by petitioner in support of its contention, is not even remotely in point.

Petitioner also urges (petition for writ of certiorari, pp. 11–12) that the interpretation for which it contends will enable the contractor to estimate more closely both the time within which and the price at which he can perform the contract, and will also give the Government the benefit of a lower bid and the promise of a more prompt performance. This argument is fallacious. Article 9 does not aid the contractor in estimating the time it will take him to complete the work, or in estimating the cost of such work, exclusive of liquidated damages. It merely removes one of the uncertainties, i. e., the risk of being charged liquidated damages for delays of a certain character, which he would otherwise have to take into account in fixing his bid-price. The interpretation requested by petitioner, instead of securing lower bids, would increase the uncertainty of the contractor regarding relief from liquidated damages and would force him to raise his bid to allow for such uncertainty. The contractor's desire to avoid increased overhead costs, together with the threat of liquidated damages which still exists under the interpretation given to Article 9 by the court below, are sufficient to secure prompt performance.

Conclusion.

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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John W. Gaskins,
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Attorneys for Respondents.

—6-6—

IN THE

Supreme Court of the United States.

October Term, 1942.

No. 366.

THE UNITED STATES, PETITIONER,

v.

BROOKS-CALLOWAY COMPANY.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT.

GEORGE R. SHIELDS,
HERMAN J. GALLOWAY,
JOHN W. GASKINS,
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IN THE

Supreme Court of the United States.

October Term, 1942.

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BROOKS-CALLOWAY COMPANY.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR THE RESPONDENT.

Opinions Below.

The opinion of the Court of Claims (R. 18-22) is not yet reported.

Jurisdiction.

The judgment of the Court of Claims was entered on June 1, 1942 (R. 22). The petition for a writ of certiorari was filed on September 1, 1942, and was granted on October 19, 1942. Jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

Question Presented.

Whether the proviso to Article 9 of the contract which provides that a contractor shall not be charged with liquidated damages for any delays due to unforeseeable causes beyond the control and without the fault of the contractor,

including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, etc., precludes the assessment of liquidated damages for delays to the work caused by high water.

Contract Provision Involved.

Article 9 of the contract in suit (R. 6; Finding 5, R. 13-14), so far as here material, provides:

"Article 9—Delays Damages: * * * * *

> "*Provided*: That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, *who shall ascertain the facts and the extent of the delay*, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto. (italics added).

Statement.

The facts are accurately but incompletely stated in petitioner's brief (pp. 4-7). The additional facts of record which need to be considered are as follows:

Respondent planned to build Section "C" of the St. Gabriel Levee, starting at the *lower* end, which was the logical and reasonable way to do the work. It was required,

through no fault of its own, to begin work at the *upper* end, thereby making the work much more susceptible to damage and delay from wet borrow pits. (Par. 7 of petition, R. 2; Finding 8 (a) R. 15; Finding 10, R. 16).

Another fact not referred to in petitioner's statement has to do with the tie-in that was required and which is covered by Paragraph 8 of the petition, R. 2; Finding 8 (b), R. 16; Finding 11, R. 17. Respondent says that however proper the order of the contracting officer to build this tie-in may have been, the fact was that doing so prevented the *then* completion of the work and was responsible for all the subsequent delay; in other words, the work straight ahead connecting the new levee with the old could have been built in about the same time that the tie-in ordered, turning off at an angel from the new levee to connect with the old, was built.

Summary of Argument.

The contracting officer decided that all of the delay in completion was due to high water. He had the right and duty so to decide. He had no authority to decide that part or all of the high water was "foreseeable." High water actually preventing work was a "flood." Floods are not foreseeable and were defined by the contract as "unforeseeable". The contract properly construed did not authorize the assessment of liquidated damages for delays in completion of the work occasioned by high waters or floods.

Argument.

Contracting Officer's Decision was a Finalty as to extent of Delay due to High Water.

The contract, Article 9, *supra*, provides that in the event of claim of delay, the contracting officer shall "ascertain the *facts* and the *extent* of the delay, and his findings of fact thereon shall be final and conclusive on the parties

hereto," with exceptions not here involved, unless it be noted that the contracting officer's decision was never communicated to the contractor (last paragraph of Finding 8 (b), R. 16) whereby the latter was deprived of any chance of the right of appeal to the Chief of Engineers.

But passing this very important failure of the contracting officer, amounting possibly to a positive breach of contract—the contractor was entitled to his *decision* on its claim, and to the right of *appeal* therefrom, both here denied by the procedure followed. It remains that the contracting officer did determine that the whole delay in the completion had been due to high water and that the contractor "should have foreseen" a delay of 183 days ($3,660 at $20 per day) of delay due to such cause (See Findings 7, 8, R. 14).

Respondent says that this decision as to the *cause* and *extent* of delays occurring was correct and *final*, but as to whether all or any part of the delay was "foreseeable" by the contractor, that was a matter outside the scope of any power or authority given him by the contract to decide. The contract so provides.

Article 9 of the contract provides that the contractor shall not be charged with liquidated damages for any delays "due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, *including, but not restricted to*, acts of God, or of the public enemy, acts of the Government, fires, *floods*, epidemics, quarantine restrictions, strikes, freight embargoes, and *unusually severe weather* * * *." (Italics supplied.)

The use of the word "including" would seem to show that floods and the other enumerated causes are illustrative examples of unforeseeable causes of delay which are to be considered in and of themselves as being "unforeseeable" and therefore excusable. See *Montello Salt Co.* v. *Utah*, 221 U. S. 452; *Phelps Dodge Corporation* v. *Labor Board*, 313 U. S. 177, 189; *Federal Land Bank* v. *Bismarck Lumber Company*, 314 U. S. 95, 100. Such an interpretation

does not, as petitioner contends, make the work "including" a word of addition. It merely removes all doubt as to whether the enumerated causes are to be regarded as unforeseeable.

If, as contended by petitioner, the contracting officer must determine whether floods, strikes, fires, or any of the other specified causes, are "unforeseeable", nothing is gained by the enumeration of such causes. The language following the word "including" would thus become pure surplusage. It is well settled that a construction which would give this effect should be avoided. *Burdon Sugar Refining Co. v. Payne*, 167 U. S. 127, 142; *Platt v. Union Pacific R. R. Co.*, 99 U. S. 48, 58; *Ladd v. Ladd*, 8 How. 10, 28; *Bethlehem Steel Co. v. United States*, 75 C. Cls. 845, 868. Petitioner suggests (pp. 8-10 of its brief) that the enumerated causes were inserted merely to avoid a narrow construction of the proviso, such as limiting it to acts of God. This suggestion is without merit. There was no reason to suspect that "unforeseeable causes" would ever be limited to acts of God.

An analysis of the specified causes supports the conclusion that they were intended to be regarded as "unforeseeable" under the terms of the contract. It is impossible to foresee precisely when such causes will take place, or the extent to which they will effect the work. This Court itself has held that the bursting of the Mississippi River through its natural banks or through artificial dikes is an unforeseen event or accident, even though such an event often occurs. *Viterbo v. Friedlander*, 120 U. S. 707, 732, 733; see also *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 367. Common sense dictates the conclusion that the word "unforeseeable" was used in Article 9 in this same sense, and that the parties did not intend to charge respondent with liquidated damages for a period when floods did not permit it to work.

It should also be noted that only one of the enumerated causes in the proviso to Article 9 is qualified in any way.

That one is "severe weather", which is preceded by the word "unusually." The lack of any such qualification before any of the other specified causes strongly indicates that they are regarded as "unforeseeable" under the contract. The rule of *expressio unius est exclusio alterius* applies.

It appears, therefore, that under a reasonable construction of Article 9 a "flood" must be construed as being in and of itself an "unforeseeable" cause of delay.

Even if the meaning of Article 9 is doubtful, such doubt should be resolved against the respondent who prepared the contract. *American Surety Co.* v. *Pauly*, 170 U. S. 133, 144; *Garrison* v. *United States*, 7 Wall. 688, 690; *The Insurance Companies* v. *Wright*, 1 Wall. 456, 468. Especially should this be true where, as here, the petitioner seeks to charge the respondent with liquidated damages.

In addition, the interpretation for which respondent contends will, in the long run, operate to petitioner's advantage. In the first place, if the parties know definitely that the specific causes must be considered excusable, litigation with regard to such causes will be avoided. Moreover, if bidders can be sure that certain causes will be regarded as unforeseeable, they will not include in their bids a contingent amount to cover liquidated damages for delays from such causes. Thus, the Government would secure lower bids. The interpretation requested by petitioner, on the other hand, would increase the uncertainty of contractors regarding relief from liquidated damages and would force them to raise their bids to allow for such uncertainty.

Petitioner stated (page 12 of its brief) that the contract called for completion of the work within 450 days, and that under normal circumstances there would be high water during 183 days, thus leaving 267 days in which high water would not interfere with the work. Petitioner then states (pages 12, 13) that a contractor who forsaw that he would have only 267 working days would count on using more men and equipment than one who planned to do the work in 450

days, and thus would have more men and equipment idle during high water than the latter. The result, says petitioner (pages 13-14) is that the contractor who anticipates delay from high water will include the cost of "stand-by" charges of the extra equipment in his bid and will thus be underbid by the contractor who fails to anticipate high water. Petitioner then concludes that the latter will get the contract, but will not be able to finish on time. This elaborate argument is purely speculative and has no bearing on the question involved in this case. It would be just as logical to assume that a contractor who anticipated high water would place sufficient equipment on the job to complete the work before the high water occurred, thus avoiding "stand-by" charges entirely.

High Water Preventing all Contract Work was a "Flood"

Respondent can offer no specific court case as authority for its premise. It can only rely on the dictionaries—and on what would appear to be plain common sense. The undertaking was to build a levee. The levee was required to be built of *dry* earth materials. Any *high water*—whether or not it was of greatly overflowing proportions—which overflowed the river banks and *flooded the borrow pits* from which necessary materials had in part to be procured, was, it is submitted, in reason a "flood" within the contract meaning. The contracting officer determined that all the delay in completion was occasioned by "high water." Could this mean anything other than that all the delay was due to "floods"?

The conclusion of the court below (R. 19) that high water which overflowed the river banks and stopped the work was a "flood" is reasonable. Webster's Dictionary defines a "flood" as "A great flow of water; a body of moving water; the flowing stream, as of a river; especially a body of water rising, swelling and overflowing land." As the court below pointed out, the term is not restricted to an overflow, although here the river apparently overflowed the

river banks, but not the existing levee. When it is considered that the term "floods" is mentioned in Article 9 as one of the excusable causes of delay, it becomes obvious that the term was intended to include rising water which caused a stoppage of the work.

In a footnote to page 14 of its brief petitioner cites three cases for the proposition that high water which overflows the banks of a river, but fails to top the levee, would not be a flood. In none of these cases was there a levee. All three cases, *LeBrun v. Richards*, 210 Cal. 308, 291 P. 825; *Poole v. Sun Underwriters Ins. Co.*, 65 S. D. 422, 274 N. W. 658, and *Mogle v. Moore*, 16 Cal. (2d) 104 P. (2d) 785, involved only the question whether the waters were surface or flood waters. Clearly, they have no bearing on the question presented in the instant case. Even if they did hold that the waters of a river must overflow the protecting levee in order to constitute a flood, they are in conflict with the views expressed by this Court. In *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 362, the Court decided the following proposition in the negative:

> "Its solution involves deciding whether the complainant as an owner of land fronting on the river had a right to complain of the building of levees along the banks of the river for the purpose of containing the water in times of flood within the river and preventing it from spreading out from the river into and over the alluvial valley through which the river flows to its destination in the Gulf, * * *."

Clearly, this Court does not hold the view that the water of a river must overflow the protecting levee in order to be a flood.

In a footnote to page 15 of its brief, petitioner cites two cases as holding that the word "floods" does not include normal, seasonable high water.

In the first case, *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 252 P. 607, the court first laid down

the rule that an upper riparian owner may divert flood waters but may not divert the normal flow of a river to the detriment of a lower riparian owner. The court then held that regular, seasonal accretions in the flow of a river were not flood waters and that the lower riparian owner could not, therefore, be deprived of their benefit. It is not clear that the river overflowed its banks as in the present case. On the contrary, it appears that during the periods of high water the water flowed into well-defined channels of sloughs which crossed the property of the lower riparian owner. In any event, the court was not concerned with any contract provision, such as Article 9, which deals primarily with causes which delay the contractor's work.

The other case, *Mammoth Gold Dredging Co.* v. *Forbes*, 39 Cal. App. (2d) 739, 104 P. (2d) 131, involved the interpretation of a deed which described the property granted as lying "between the present high water mark on the right hand bank of the Yuba River and the center of said river." The only question presented was whether the property extended to a visable high-water mark existing on the permanent perpendicular bank or merely to a temporary gravel bank adjacent to the diminished summer flow of the river. The court held that the property extended to the high-water mark existing on the permanent river bank, citing *Herminghaus* v. *Southern California Edison Co., supra.* It is clear that the high-water mark lay within the permanent banks of the river. Respondent fails to see what bearing this case has upon a case where the river overflowed its banks. It is also obvious that the court was not concerned with the effect of such an overflow upon a contractor's work, or with a contract provision similar to the Standard Article 9.

Even if these cases did hold that seasonable high water overflowing a river's bank does not constitute a flood, they appear to be in conflict with the views of this Court. See *Cubbins* v. *Mississippi River Commission* and *Viterbo* v. *Friedlander, supra.*

"*Floods*" *Were and Are Unforeseeable.*

Based on past history, floods might *possibly* be expected, but not *certainly*. The "past history" considered by the contracting officer as indicating such a possibility included the unexampled flood years of the late 1920's. No one could fairly anticipate or foresee recurring floods of like proportions. And in any event, who can say that one must foresee and provide against contingencies the happening of which can only be determined by the event? And besides, and over weighing all this respondent submits that fairly construed the contract listed "floods" as among the "unforseeable" causes of delay that would excuse the assessment of damages.

Conclusion.

For the foregoing reasons it is respectfully submitted that the decision of the court below is correct and should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 366.—October Term, 1942.

The United States, Petitioner, vs. Brooks-Callaway Company. } On Writ of Certiorari to the Court of Claims.

[February 1, 1943.]

Mr. Justice Murphy delivered the opinion of the Court.

We are asked to decide whether the proviso to Article 9 of the Standard Form of Government Construction Contract[1] which provides that a contractor shall not be charged with liquidated damages because of delays due to unforseeable causes beyond the control and without the fault of the contractor, including floods, requires the remission of liquidated damages for delay caused by high water found to have been customary and forseeable by the contracting officer.

Respondent brought this suit in the Court of Claims to recover the sum of $3,900 which was deducted from the contract price as liquidated damages for delay in the completion of a contract for the construction of levees on the Mississippi River. The contract was not completed until 290 days after the date set, and liquidated damages in the amount of $5,800 (figured at the contract rate of $20 for each day of delay) were originally assessed. Respondent protested, and upon consideration the contracting officer found that respondent had been delayed a total of 278 days by high water, 183 days of which were due to conditions normally to be expected and 95 of which were unforseeable. He recommended that liquidated damages in the amount of $1,900 (representing 95 days of unforeseeable delay at $20 per day) be re-

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[1] In general Article 9 gives the Government the option of terminating the contractor's right to proceed, or of allowing him to proceed subject to liquidated damages if he fails to proceed with diligence or to complete the work in time. The full text of the proviso is:

". . . *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: . . ."

mitted and that the balance of $3,900 be retained. Payment was made on this basis.[2]

The Court of Claims held that liquidated damages should not have been assessed for any of the 278 days of delay caused by high water because the high water was a "flood" and under the proviso all floods were unforseeable *per se*. Accordingly, it gave judgment in respondent's favor in the sum of $3,660.[3] No findings were made as to whether any of the high water was in fact foreseeable. We granted certiorari because the case presents an important question in the interpretation of the Standard Form of Government Construction Contract.

We believe that the construction adopted below is contrary to the purpose and sense of the proviso and may easily produce unreasonable results. The purpose of the proviso is to remove uncertainty and needless litigation by defining with some particularity the otherwise hazy area of unforseeable events which might excuse non-performance within the contract period. Thus contractors know they are not to be penalized for unexpected impediments to prompt performance, and, since their bids can be based on forseeable and probable, rather than possible hindrances, the Government secures the benefit of lower bids and an enlarged selection of bidders.

To avoid a narrow construction of the term, "unforseeable causes", limiting it perhaps to acts of God, the proviso sets forth some illustrations of unforseeable interferences. These it describes as "including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors due to such causes". The purpose of the proviso to protect the contractor against the unexpected, and its grammatical sense both militate against holding that the listed events are always to be regarded as unforseeable, no matter what the attendant circumstances are. Rather,

[2] The contracting officer found that the remaining delay of 12 days (the difference between the total delay of 290 days and the 278 days due to high water) was not excusable, as claimed by respondent, on account of the Government's failure to secure a necessary right of way, or on account of the requirement by the contracting officer that respondent build a tie-in levee. On these points the court below sustained the conclusions of the contracting officer. Respondent has not appealed and this phase of the case is not before us.

[3] — C. Cls. —, decided June 1, 1942.

the adjective "unforseeable" must modify each event set out in the "including" phrase. Otherwise absurd results are produced as was well pointed out by Judge Madden, dissenting below:

". . . Not every fire or quarantine or strike or freight embargo should be an excuse for delay under the proviso. The contract might be one to excavate for a building in an area where a coal mine had been on fire for years, well known to everybody, including the contractor, and where a large element of the contract price was attributable to this known difficulty. A quarantine, or freight embargo, may have been in effect for many years as a permanent policy of the controlling government. A strike may be an old and chronic one whose settlement within an early period is not expected. In any of these situations there could be no possible reason why the contractor, who of course anticipated these obstacles in his estimate of time and cost, should have his time extended because of them.

The same is true of high water or 'floods'. The normally expected high water in a stream over the course of a year, being foreseeable, is not an 'unforseeable' cause of delay. Here plaintiff's vice-president testified that in making its bid plaintiff took into consideration the fact that there would be high water and that when there was, work on the levee would stop. . . ."[4]

A logical application of the decision below would even excuse delays from the causes listed although they were within the control, or caused by the fault of the contractor, and this despite the proviso's requirement that the events be "beyond the control and without the fault or negligence of the contractor". If fire is always an excuse, a contractor is free to use inflammable materials in a tinder-box factory and escape any damages for delay due to a resulting fire. Any contractor could shut his eyes to the extremest probability that any of the listed events might occur, submit a low bid, and then take his own good time to finish the work free of the compulsion of mounting damages, thus making the time fixed for completion practically meaningless and depriving the Government of all recompense for the delay.

We intimate no opinion on whether the high water amounted to a "flood" within the meaning of the proviso. Whether high water or flood, the sense of the proviso requires it to be unforeseeable before remission of liquidated damages for delay is warranted. The contracting officer found that 183 days of delay caused by high water were due to conditions normally to be expected.[5] No

[4] — C. Cls. —, —.

appeal appears to have been taken from his decision to the head of the department, and it is not clear whether his findings were communicated to respondent so that it might have appealed. The Court of Claims did not determine whether respondent was concluded by the findings of the contracting officer under the second proviso to Article 9,[5] and not having made this threshold determination, of course made no findings itself as to foreseeability. We think these matters should be determined in the first instance by the Court of Claims. Accordingly the judgment is reversed and the cause remanded with instructions to determine whether respondent is concluded by the findings of the contracting officer, and, if not, for a finding by the court whether the 183 days of high water or any part of that time were in fact foreseeable.

So ordered.

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[5] The second proviso to Article 9 immediately follows the unforeseeability proviso and states:

"*Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties thereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto."

A true copy:

Test:

Clerk, Supreme Court, U. S.